Supreme Court, U.S.
FILED

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No. _____

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1995

PERRY MARUCA,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF COLORADO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the admission of incriminating statements and evidentiary observations procured through custodial interrogation in violation of *Miranda* can be admitted in a state criminal proceeding under a "voluntariness" theory, in overt disregard of this Court's opinion in *Michigan v. Mosley* 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975)?

2. Whether the admission of evidence derived directly from a *Miranda* violation is "harmless error" where the resultant testimony included an alleged acknowledgement of wrongdoing by the accused and contradictory statements concerning the complaining witness' conduct?

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No. _____

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OPINION BELOW

The opinion of the Colorado Court of Appeals is set forth in the Appendix, as is a copy of the Order denying the copy of the appeals court denial of rehearing, and the order by the Colorado Supreme Court denying Writ of Certiorari, rendering this a final judgement.

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

28 U.S.C. § 1257(A): Certiorari jurisdiction for review of state court criminal proceedings.

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment V:

No person...shall be compelled, in any criminal case, to be a witness against himself...

STATEMENT OF THE CASE

Petitioner was convicted of a state criminal charge of felony menacing arising out of a domestic dispute between him and his girlfriend, May Okihiro. Petitioner and Okihiro had become involved in an extended argument taking place over a two-day period about the future of their relationship; the police were not called but Okihiro left, taking her possessions with her, when petitioner went to work. The police only became involved in following up a subsequent "missing person" report filed by petitioner: petitioner's girlfriend told the police, after they had located her, that petitioner had threatened suicide during the course of the argument, culminating in his allegedly threatening to "take her with him" while holding a firearm.

Perry Maruca was then told by the police to come to the station where, in an interview room, after being told he was under arrest, he invoked his right to remain

silent, advising the inquiring officers unequivocally that "he did not wish to speak" to them. The trial judge found that no *Miranda* advisal was given.

Despite this invocation of the right to remain silent, however, one of the officers persisted in questioning petitioner, asking him "where his guns were." This inquiry led to petitioner admitting that he had firearms, that he knew why the detective had asked him about his guns, acknowledging that it might be appropriate to turn those firearms over to the officers for "safekeeping."

After these incriminating responses, petitioner and the two officers traveled to his home, where firearms were observed and seized. In addition, during the course of this firearms foray, petitioner allegedly made two additional statements: that he had been "thinking of taking himself out" and that "he knew that May Okihiro had left him because she had taken her clothes with her." These two remarks were highly incriminating. The first statement corroborated the complaining witness' account of the incident. The latter utterance was inconsistent with the missing persons report that petitioner had filed, the document which was the genesis of the entire investigation.

Despite uncontroverted testimony that Perry Maruca was questioned while under arrest in a police interview room, a fact finding that no *Miranda* warning was given, and uncontroverted testimony from one of the officers that he questioned petitioner *after* the accused unequivocally stated that he did not wish to speak with the officers, the trial court held that the information provided about the handguns was admissible as "volunteered." The trial judge disregarded the *Miranda* and *Mosley* decisions entirely, denying

suppression of the statements and subsequent seizures on the theory that the question asked arose because of the officers' duty "to tell people why they are being taken into custody!"

Despite the essentially uncontroverted facts, and this curious ruling by the trial court which utterly ignored the facts, the Colorado Court of Appeals affirmed the conviction in a 2:1 decision. The Court of Appeals reached an equally insupportable legal conclusion that the constitutional violations which took place were "harmless error." The Colorado Supreme Court denied certiorari, making this a final state court judgment.

ARGUMENT

THE STATEMENTS ATTRIBUTED TO PETITIONER AND RESULTANT EVIDENTIARY OBSERVATIONS MADE BY THE OFFICERS SHOULD NOT HAVE BEEN ADMITTED AT TRIAL, AS SUCH EVIDENCE WAS OBTAINED UNCONSTITUTIONALLY; THIS EVIDENCE WAS HARMLESS BEYONDA REASONABLE DOUBT

In this state criminal trial, incriminating statements by the accused and physical evidence seized as a direct consequence of petitioner's statements were admitted at trial. The evidence at the suppression hearing established the following essential facts concerning the statements obtained and the consequent seizures:

1) that petitioner was in custody, and was not free to leave;

2) that petitioner was advised that he was under arrest for felony menacing;

3) that petitioner expressed a clear-cut desire to remain silent;

4) that after invoking his right to remain silent, petitioner was specifically questioned without *Miranda* advisal and in disregard of his invocation of the right to remain silent concerning the location of "his guns;"

5) that such questioning concerning the whereabouts of guns took place several days after the alleged incident, when there was no danger to public safety;

6) that evidence about the statements elicited and physical evidence thereafter seized was admitted over defense objections during petitioner's trial; and finally,

7) that the credibility of the complaining witness was essential to the prosecution's case since no physical evidence substantiated her story, credibility which was enhanced by the evidence obtained through custodial interrogation in violation of *Miranda.*

These facts require that this unconstitutionally obtained conviction be set aside.

This Court's landmark decision in *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), established the entitlement to be advised of the

right to remain silent and the right to terminate custodial questioning through the invocation of the Fifth Amendment. In creating *Miranda* warnings, this Court traced the historical underpinnings of the Fifth Amendment, noting that: "These precious rights were fixed in our Constitution only after centuries of persecution and struggle." *Id.* at 442. *Miranda* established that a proper advisement of rights "is an absolute prerequisite to interrogation," but perhaps more importantly here, definitively directed that if "an individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him." *Id.* at 445, 471.

An aspect of this Court's rationale in *Miranda* was the recognition of the pervasive persuasiveness of police interrogation procedures. One form of interrogation discussed in *Miranda* was that of displaying an "air of confidence in the suspect's guilt," that the "guilt of the subject is to be posited as a fact." *Id.* at 450. Just such a technique was utilized here: despite the invocation of the right to remain silent, petitioner was specifically questioned about the whereabouts of "his guns," as though there was no doubt that he in fact possessed firearms and that they had been recently utilized in some sort of altercation with his girlfriend.

As this Court made clear in *Miranda*, custodial interrogation means "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.* at 444. There was no dispute that Perry Maruca was asked to come to the police station, was placed under arrest, and thereafter, stated that he did not wish to speak with the officers yet custodial interrogation followed. A more patent

Miranda violation can hardly be imagined. As this Court made manifest in *Miranda*:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. *Id.* at 473-474.

This right to "cut off" questioning is critical: without this entitlement, the coercive setting of custodial interrogation has the effect of overcoming the free will of persons accused of crime, thus producing incriminating statements even after *Miranda* advisal is given and the desire to remain silent has been expressed. *Id.* at 474.

This prophylactic rule is designed to safeguard an essential freedom. Thus, once the accused indicates that he or she wishes to remain silent, all interrogation must cease. All further police-initiated questioning is proscribed even if the suspect "has been advised of his rights." *Edwards v. Arizona*, 451 U.S. 477, 484, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

Miranda and *Edwards* require that incriminating information provided by a suspect subjected to custodial interrogation after invocation of the right to remain be excluded from trial. There are no ifs, ands, or buts about it: the "merit of the *Edwards* decision lies in the clarity of its command and the certainty of its application." *Minnick v. Mississippi*, 498 U.S. 146, 151, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990).

Miranda, Edwards, and their progeny establish indisputably that police officers are not permitted to question suspects in custody after the accused invokes the right to remain silent or requests an attorney. This entitlement has been described in a variety of ways. For

example, in *Lego v. Twomey*, 404 U.S. 477, 488, 92 S.Ct. 619, 30 L.Ed.2d 618 (1972), this Court explained that *Miranda* "excludes confessions flowing from custodial interrogations unless adequate warnings were administered and a waiver was obtained."

Similarly, in *Berkemer v. McCarty*, 468 U.S. 420, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984), this Court stated:

> In the years since the decision in *Miranda*, we have frequently reaffirmed the central principle established by that case: if the police take a suspect into custody and then ask him questions without informing him of the rights enumerated above, his responses cannot be introduced into evidence to establish his guilt. *Id.* at 429.

As the *Berkemer* opinion elucidates, the purpose of *Miranda* is to guarantee that the police do not coerce captive suspects into making incriminating statements, and "as much as possible to free courts from the task of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." *Id.* at 433.

Thus, the breadth of *Miranda*:

> The *Miranda* exclusionary rule, however, serves the Fifth Amendment and sweeps more broadly than the Fifth Amendment itself. It may be triggered even in the absence of a Fifth Amendment violation. The Fifth Amendment prohibits the prosecution in its case in chief only of *compelled* testimony. Failure to administer *Miranda* warnings creates a presumption of compulsion. Consequently, unwarned statements that are otherwise voluntary

> within the meaning of the Fifth Amendment must nevertheless be excluded from evidence under *Miranda*. Thus, in the individual case, *Miranda's* preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm. *Oregon v. Elstad*, 470 U.S. 298, 307, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985).

The presumption of compulsion created by this Court's *Elstad* decision compels the conclusion that this state court conviction was unconstitutionally obtained: that damaging incriminating statements and the fruits thereof were admitted into evidence despite having been obtained in violation of *Miranda* and in the face of an unequivocal invocation of the right to remain silent by the accused.

In this case, the Colorado courts also thumbed their judicial noses at *Michigan v. Mosley*, 423 U.S. 96, 96 S.Ct. 321, 46 L.Ed.2d 313 (1975). In that case, Richard Mosley told the police after questioning began that he did not want to answer questions. Although questioning temporarily terminated, a short time later subsequent questioning took place. In deciding the *Mosley* case, this Court discussed *Miranda*, and concluded as follows:

> In sum, the Court held in that case that unless law enforcement officers give certain specified warnings before questioning a person in custody, and follow certain specified procedures during the course of any subsequent interrogation, any statement made by the person in custody cannot over his objection be

> admitted in evidence against him as a defendant in trial, *even though the statement may in fact be wholly voluntary.* *Id.* at 99-100 (emphasis supplied).

This was the essence of the error committed by the state courts here: a later finding of "voluntariness" is not and has never been a substitute for *Miranda* advisal and the duty to "scrupulously honor" a suspect's invocation of the right to remain silent.

There can be little doubt that the question asked was custodial interrogation. Custodial questioning includes those methodologies "that the police should know is reasonably likely to evoke an incriminating response from a suspect...." *Rhode Island v. Innis*, 446 U.S. 291, 301, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980). There was no claim by the inquiring officer that his question was prompted by a concern for public safety or by exigent circumstances.

On the contrary, the incident with Okihiro had occurred days before, and the investigation had only taken place because of the report filed by petitioner who was concerned about the whereabouts of his girlfriend. Indeed, at the time of inquiry, the police had no information from the complaining witness to the effect that shots had been fired during the incident, although Okhiro's story in that regard changed dramatically at trial. *Cf. New York v. Quarles*, 467 U.S. 649, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984)("public safety" exception to the *Miranda* exclusionary rule).

This is not a case where the suspect personally initiated further discussions with law enforcement authorities. *See, e.g., Oregon v. Bradshaw*, 462 U.S. 1039, 103 S.Ct. 2830, 77 L.Ed.2d 405 (1983). Nor does it involve a situation where the evidence was offered in

rebuttal, to impeach the accused after testimony. *See Michigan v. Harvey,* 494 U.S. 344, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990).

In this case the evidence obtained was introduced in the prosecution's case in chief, to help convict the defendant, who did not testify at trial. The admissions in this case flowed directly from "coercive activity" by the State. *See Colorado v. Connelly*, 479 U.S. 157, 165, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986). The claim that petitioner subsequently "consented" to the search of his home runs afoul of well-established case law to the contrary. *See, e.g., Florida v. Royer,* 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983).

The "harmless error" analysis by the majority of the Colorado Court of Appeals was also fatally flawed, premised as it was on the theory that the admission of testimony concerning the statements and subsequent evidentiary observations and seizures had no impact on the jury, as two of the three appellate judges concluded. This felony menacing conviction was premised entirely on the credibility of the complaining witness. Her believability was substantially bolstered by the incriminating and inconsistent remarks attributed to Perry Maruca and the officers' own observations about the existence of firearms in the home.

It is simply impossible to fairly conclude that testimony about petitioner's acknowledgement that: his guns were properly turned over to the police for "safekeeping;" that he had been contemplating suicide, and his inconsistent comments about why his girlfriend had moved out; had no effect on the verdict, let alone that such evidence was harmless beyond a reasonable doubt. *See Chapman v. California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). The statements attributed

to Perry Maruca included his concession that there was a reason to turn his guns over to the police for "safekeeping" and that he had been contemplating suicide. These reputed remarks directly corroborated the claim by his girlfriend that, while holding a firearm, he claimed that he was going to "take her with him."

Such evidence was hardly harmless; on the contrary, this evidence was devastating, perhaps "the most probative and damaging evidence" introduced into evidence in this cases in a manner inconsistent with "the thesis that ours is not an inquisitorial system of criminal justice." *Arizona v. Fulminante*, 490 U.S. 279, 292-294, 111 S.Ct. 1246, 113 L.Ed.2d 302 (1991). As this Court acknowledged in *Fulminante*:

> A confession is like no other evidence. Indeed, "the defendant's own confession is probably the most probative or damaging evidence that can be admitted against him... [T]he admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so." *Id.* at 296, *quoting Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).

Thus, as this Court even more recently opined:

> The inquiry, in other words, is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely

unattributable to the error. *Sullivan v. Lousiana,* 508 U.S. ___ 113 S.Ct. ___, 124 L.Ed.2d 182, 189 (1993).

As the dissenting state appellate judge noted, the testimony concerning the incriminating statements attributed to petitioner and the evidentiary observations by the officers corroborated the account of the incident provided by the complaining witness, testimony unsubstantiated by physical evidence or any other evidence. No fair reading of the record could possibly give rise to a supportable conclusion that the challenged evidence was harmless beyond a reasonable doubt, that the guilty verdict in petitioner's trial was "surely unattributable" to the improperly obtained evidence, as is required under *Sullivan.* As a consequence, petitioner prays for an order granting certiorari, to reverse the judgment of the Colorado Court of Appeals affirming petitioner's conviction of felony menacing.

Respectfully submitted,

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APPENDIX A
COLORADO COURT OF APPEALS
No. 93CA1033

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellee,
v.
PERRY MARUCA,
Defendant-Appellant.

Appeal from the District Court of Boulder County
Honorable Joseph Bellipanni, Judge
No. 92CR1078

(Filed October 6, 1994)
DIVISION IV JUDGEMENT AFFIRMED
Opinion by JUDGE HUME
Davidson, J., concur
Pierce, J., * dissents

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*Sitting by assignment of the Chief Justice under provisions of the Colo. Const. art. VI, Sec. 5(3), and §24-51-1105, C.R.S. (1993 Cum. Supp.).

Defendant, Perry Maruca, appeals from a judgment of conviction entered upon a jury verdict finding him guilty of felony menacing. We affirm.

I.

The principal issue raised by defendant concerns the trial court's refusal to suppress testimony concerning weapons found at the defendant's apartment and statements that defendant made concerning his suicidal thoughts. The trial court ruled that this evidence was obtained from defendant's volunteered statements. We perceive no reversible error.

Defendant was asked by police to come to the police station, where he was arrested for felony menacing. After his arrest he became agitated and quite vocal, and there is evidence to support the trial court's finding that he was not given *Miranda* warnings at that time. After the arresting officers had calmed him, one of them asked defendant where his guns were. Defendant initially refused to answer that question, but after further reflection and without further interrogation, he volunteered to surrender his guns to the police for safekeeping.

The officers then accompanied defendant to his residence where he turned the guns over to them and made a statement regarding his previous thoughts of suicide. Still later, defendant made a third statement to the effect that he knew the victim was leaving him because she had "taken a lot of clothes with her."

At trial, the guns were not placed into evidence. One of the officers testified about the suicide statement and both officers testified that guns matching the description given by the victim were recovered from defendant's apartment and that they were in working order.

Here, the evidence is sufficient to support the trial court's finding that defendant's statements to police were voluntary and not the product of coercion by virtue of the custodial setting in which they were made. The statements made by defendant during and after the visit to his home were volunteered rather than being made in response to any police interrogation. They were made long after the sole inquiry made by the officers at the police station. Similarly, defendant's physical surrender of the guns at his home was a volitional act performed after he had initially exercised his right to remain silent and without further request or inquiry by the officers.

Even if we assume that the initial statement indicating defendant's willingness to surrender the guns was elicited in violation of the *Miranda* rule, the U.S. Supreme Court has held that, under some circumstances, the improper admission of such evidence may be considered harmless if other evidence of the accused's guilt is overwhelming. *See Arizona v. Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L.Ed.2d 302 (1991); *Milton v. Wainwright*, 407 U.S. 371, 92 S.ct. 2174, 33 L.Ed.2d 1 (1972).

Here, the defense presented no evidence. The bulk of the People's evidence consisted of the extensive testimony by the victim who described in detail how defendant had threatened her with the guns and indicated that he intended to commit suicide and "take her with him." In view of this testimony, the brief corroborative testimony of the police officers relating to the weapons and to defendant's statements was harmless.

Our review of the record leaves us with no reasonable doubt that the jury in this case would have reached the same verdict without hearing the testimony of either officer and that there was overwhelming evidence of guilt, fairly established by

the state through the use of evidence which is not being challenged. *See Milton v. Wainwright, supra. See also Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *People v. Wilson*, 709 P.2d 29 (Colo. App. 1985).

Therefore, we conclude that any error in the trial court's refusal to suppress the statements made by defendant and the ensuing testimony regarding the weapons that flowed from those statements was harmless beyond a reasonable doubt.

II.

Defendant also contends that he was denied a fair trial when, during closing argument, the prosecutor implied that more serious charges could have been filed and indicated his own personal knowledge of the alleged embarrassment of the victim. We disagree.

In closing argument, counsel is entitled to argue all reasonable inferences from the facts and evidence, *People v. Constant*, 645 P.2d 843 (Colo. 1982), *cert. denied*, 459 U.S. 832, 103 S.Ct. 73, 74 L.Ed.2d 72 (1982). Counsel may, with propriety, comment on how well and in what manner a witness measures up to the tests of credibility set forth in the instructions. *People v. Lucero*, 677 P.2d 370 (Colo. App. 1983), *cert. dismissed* 706 P.2d 1283 (Colo. 1985). We perceive no reversible error in the statements complained of here.

Judgement affirmed.
JUDGE DAVIDSON concurs.
JUDGE PIERCE dissents.

JUDGE PIERCE dissenting.

I respectfully dissent.

I cannot agree that the testimony of the police officers in this action was harmless beyond a reasonable doubt.

The case had to stand or fall on the credibility of the complaining witness. A great deal of her testimony concerned the actions and statements of the defendant regarding his threats of suicide. The testimony also concerned descriptions of the weapons and their location in the apartment.

The cross-examination also pointed out some discrepancies. The most serious of which was that in her testimony the complaining witness made references to a shot probably being fired. She admitted that she had not informed the police of this fact prior to her testimony. The testimony of the police officers, the only other witnesses, gave strong support both to the location of the weapons, their appearance, and that they were capable of being fired. Their testimony also gave credance to the victim's several statements regarding the intent to commit suicide by the defendant. I would rule that the prosecution has not carried its burden of proving that this evidence was harmless beyond a reasonable doubt.

When a harmless error ruling is not available, the usual rules regarding the type of interrogation involved here apply.

In *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), The United States Supreme Court promulgated safeguards to protect the constitutional rights of persons subjected to custodial police interrogation. After prescribing

certain warnings which the police must give before questioning begins, the court stated that if the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, then interrogation must cease. That principle was violated here.

In *People v. Thomas,* 839 P.2d 1174, 1179 (fn. 4) (Colo. 1992), the Colorado Supreme Court stated; "If statements are made while in custody, such statements will be supressed if *Miranda* warnings have not been given, whether or not they are voluntarily made." *See also Oregon v. Elstad,* 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985) (statements taken in violation of *Miranda,* though voluntary, must be excluded from evidence in the prosecution's case).

Here, it is clear that the defendant was under arrest and in custody and had not been given *Miranda* warnings. He refused to talk to police, but they continued their interrogation and asked him where the guns were. All of his statements thereafter and the recovery of the weapons were the fruit of the "poisonous tree" and should have been supressed. *Wong Sun v. United States,* 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *People v. Breidenbach,* 875 P.2d 879 (Colo. 1994).

Accordingly, I would reverse the judgment and remand the cause to the trail court for a new trial.

APPENDIX B

THE COURT OF APPEALS OF THE STATE OF COLORADO

Case Number 93CA1033

ORDER

PEOPLE V PERRY MARUCA

Upon consideration of the Petition for Rehearing filed by the Appellant herein, the Petition is hereby DENIED. Pierce, J. would GRANT. It is ordered that issuance of the Mandate is stayed to and including December 05, 1994 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado, the stay shall remain in effect until disposition of the cause by the Supreme Court.

BY THE COURT:
Hume, J.
Davidson, J.
Pierce, J.

DATED: November 03, 1994

(SEAL)

APPENDIX C

SUPREME COURT, STATE OF COLORADO
CASE NO. 94SC696
CERTIORARI TO THE COLORADO COURT OF APPEALS, 93CA1033
DISTRICT COURT, BOULDER COUNTY, 87CR625

ORDER OF COURT

PERRY MARUCA,

Petioner,

v.

THE PEOPLE OF THE STATE OF COLORADO,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the judgment of said Court of Appeals,

IT IS THIS DAY ORDERED that said Petition for Writ of Certiorari shall be, and same hereby is, DENIED.

BY THE COURT, EN BANC, JUNE 5, 1995

cc:

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Patrick H. Sanford, Clerk
Colorado Court of Appeals

(SEAL)

95-206

No. _____

SEP 8 1995
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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

PERRY MARUCA,
Petitioner,
vs.
THE STATE OF COLORADO,
Respondent.

On Petition for Writ of Certiorari to the Colorado Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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25 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether the evidence reasonably supports the Colorado trial court's finding that Petitioner, in custody and un-Mirandized, voluntarily consented to (indeed, invited) a police search and seizure of his two handguns in his home?

(Or, alternatively, whether the evidence reasonably supports admission of the search-observation testimony under the doctrines of inevitable discovery or independent evidence?)

2. Whether the evidence reasonably supports the Colorado trial court's findings that none of three un-Mirandized, custodial admissions by Petitioner was preceded by interrogation and that all were voluntary?

3. Whether the evidence reasonably supports the Colorado Court of Appeals' alternative conclusion that there was overwhelming evidence of Petitioner's guilt beyond a reasonable doubt regardless of the three admissions and the search-observation testimony, rendering any errors in their admission harmless beyond a reasonable doubt?

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1995

PERRY MARUCA,
Petitioner,
vs.
THE STATE OF COLORADO,
Respondent.

On Petition for Writ of Certiorari
to the Colorado Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

STATEMENT OF THE CASE

Petitioner, Perry Maruca, seeks certiorari review of the Colorado Court of Appeals' affirmance of his conviction of felony menacing, a class 5 felony violating § 18-3-206, Colo. Rev. Stat. (1986). The Colorado Supreme Court denied certiorari. The facts of his crime and of the legal issues he raises are summarized as follows.

A. FELONY MENACING (TRIAL EVIDENCE)

Against Petitioner Maruca's will, his fiance, Dr. May Okihiro, wanted to end their engagement, move out, and terminate their rocky, three-year relationship. One day they argued about it for an hour or two, then she backed off. The next morning Petitioner re-started the argument, indi-

cating now that he was going to kill himself. He took a bag that she believed contained his guns and drove away.

When Petitioner came home, May renewed her insistence that they go their separate ways. This angered him. Then he said, "That's it then, I wasn't going to do it but after reading your letter [that she had just given him], I am just going to do it here." Then he brought two handguns in from his car.

Very angry, Petitioner continued to threaten to kill himself. Moving fast, he looked around upstairs for bullets. May begged him not to do it and threatened to call the police. Armed with at least one gun, he grabbed the phone from her, went downstairs, grabbed another phone, and put the two phones in his car.

Then he went back upstairs, still threatening to kill himself. May tried to grab the gun or guns from him and he wrestled with her. She ran into another room and picked up a third phone. Still armed, he said, "If you call the police, I will take you with me. Is that what you want me to do. Is that what you want me to do? Do you want me to take you with me?"

She said no; he reached around her and grabbed the third phone from her. He was very agitated and angry. She was afraid he was going to kill both of them. He pulled the phone out of the wall and broke the receiver. She ran downstairs. Upstairs he said, "Well, I am just going to do it now," counted aloud down to one, and fired.[1] She

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[1] However, firing the gun is not an element of the crime of felony menacing. § 18-3-206, Colo. Rev. Stat. (1986). The elements are: "by any threat or physical action, knowingly places or attempts to place another person in fear of imminent

screamed and ran back upstairs, and he said, "This is what it's going to sound like when I do it."

Petitioner then bullied May verbally, repetitively, for another hour or two. A fourth phone rang, and he would not let her answer; her friend Deborah left a message. Deborah called back four or five times, but Petitioner refused to let May answer. He became more and more angry in response to the ringing. May finally insisted on answering and told Deborah she was okay. Then he angrily made May call her back and tell her not to call the police. He continued to harangue May that evening until he calmed down and fell asleep.

The harangue continued the next morning. Petitioner repeated a previous threat to make May's life miserable if she did not marry him. That night, when he was out, she departed, first going to Deborah's house, then to the Boulder Safe House. She took her clothes and left him a note that she had gone to the safe house.

Petitioner thereafter reported May to the police as missing. When the police located and talked to her at the safe house, she informed them of the menacing incident, including his threats to kill himself and her. She also related her departure from Petitioner's home, including taking her clothes and leaving him a note. The police then phoned him and asked him to come to the Justice Center to "chat." (They did not "order" him to do so, as his Petition claims at p. 2.)

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serious bodily injury . . . by the use of a deadly weapon . . . ." *Id.*

B. OFFICERS' SUPPRESSION TESTIMONY

At the suppression hearing, Deputy Scott and Detective Norton testified as follows.

1. Arrest & Non-Advisement; "Where Are the Guns?"; Refusal to Answer

Petitioner was taken to an interview room with Deputy Scott and Detective Norton. Scott advised Petitioner he was being arrested, for felony menacing.

No interrogation commenced. Rather, Petitioner immediately became very upset and agitated, volunteering that he did not wish to speak to the officers, denying the charge, and saying he wanted to leave. Scott had been preparing to give Petitioner the *Miranda* advisement, but overlooked and omitted it in the confusion of both calming Petitioner down and putting himself in a defensive position against possible violence from Petitioner.

After Petitioner was calmed down, the officers said only one thing: Detective Norton asked Petitioner, "Where are the guns?" Petitioner replied that he was not going to tell them. The officers said nothing more.

2. Volunteered Statement: Offer to Surrender the Guns

About a minute passed in silence. The officers said nothing. They did nothing to elicit further response. Detective Norton was thinking about the fact that he would have to get a search warrant.

Then Petitioner volunteered to take them to his home and give them the guns "for safekeeping." The officers did not accept "safekeeping" as a limitation on receipt of the guns. Nor did they did make any further statement or request about the guns. Detective Norton did explain that Petitioner would have to go handcuffed in a patrol car with Deputy Scott. Petitioner agreed.

3. Two Later Volunteered Admissions

At Petitioner's house the officers followed him and he showed them where two handguns were. The officers seized them. Petitioner's demeanor was "real cooperative" and everyone's tone of voice was normal.

Before Petitioner and the officers left his house, they gave water to Petitioner's dog. They had been at the house 15 to 20 minutes. Then Petitioner volunteered to Detective Norton that he had been thinking about "taking himself out" but had decided not to because he had too much to lose. The officers had not asked him any questions prior to this statement and had not done anything to try to elicit it.

Going back to the Justice Center with Deputy Scott, Petitioner volunteered that he had known May was leaving because she had taken clothes with her. Again, the officers had not said anything to Petitioner before that statement or done anything to try to elicit it.

C. PETITIONER'S SUPPRESSION TESTIMONY

Petitioner testified at the suppression hearing that he was age 33, working as a registered nurse for the University of Colorado (holding a four-year degree in nursing), and getting a degree in mechanical engineering. He said that when he

was with the officers his thinking was not confused and he understood what they said.

His testimony reasonably supported, and did not contradict, the voluntariness of his offer and consent to search, as well as the voluntariness of his two later statements. His testimony reasonably supported, and did not contradict, the complete absence of questioning other than the request for the location of the guns, and the complete absence of coercive conduct or statements.

D. SUPPRESSION DENIED; EVIDENCE AT TRIAL

The state trial court found that Petitioner received no *Miranda* advisement, but was not interrogated. The trial court also found that Petitioner voluntarily gave the guns to the officers, without the officers accepting the "safekeeping" limitation he initially proposed.

Both officers testified at trial to Petitioner's offer and surrender of the guns "for safekeeping." They said guns matching the description given by the victim were recovered in working order from Petitioner's home. Victim May had already testified that Petitioner had one or two handguns in his hands when he was threatening to kill himself and her. The guns were not placed into evidence.

The officers also testified at trial to Petitioner's statements to them that he had intended to kill himself and that he had known May was leaving because she had taken her clothes. Again, May had already told the jury about his threats to kill himself and about having left him a departure note and taken her clothes.

Petitioner presented no evidence at trial.

E. AFFIRMANCE ON APPEAL

Based on the preceding essentially uncontroverted facts, the Colorado Court of Appeals affirmed, as follows.

Consensual Search. The court of appeals held the evidence sufficient to support the trial court's finding that Petitioner's offer to take the police home and give them his guns was "voluntary and not the product of coercion." The court added that "defendant's physical surrender of the guns at his home was a volitional act performed after he had initially exercised his right to remain silent and without further request or inquiry by the officers."

Volunteered Later Statements. The court of appeals held that the two later admissions "were volunteered rather than being made in response to any police interrogation. They were made long after the sole inquiry made by the officers at the police station."

Harmlessness Beyond Reasonable Doubt; Overwhelming Evidence of Guilt. The court of appeals held that, even if the search offer was elicited in violation of *Miranda*, the admission of its fruit (the officers' observation testimony) was harmless beyond a reasonable doubt, since other evidence of the accused's guilt was overwhelming.

Victim's Testimony. The court of appeals particularly noted the independent evidence of the three admissions, citing "the extensive testimony by the victim who described in detail how defendant had threatened her with the guns and indicated that he intended to commit suicide and take her with him." The court thus viewed the officers' "brief corroborative testimony" about the guns and about Petitioner's statements as cumulative to May's independent, overwhelm-

ing evidence, and thus (if erroneous) harmless beyond a reasonable doubt.

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be dismissed, for it presents no new legal issue and turns on essentially factual claims challenging trial court findings and appellate conclusions that all have reasonable support in the evidence. Specifically:

As the appellate court concluded, the evidence reasonably supports the trial court's finding that the search and seizure of Petitioner's two handguns in his home (at his invitation) was consensual, hence that testimony about it was admissible. Alternatively, the evidence reasonably supports affirmance under either the inevitable discovery or independent evidence doctrine.

As the appellate court also concluded, the evidence reasonably supports the trial court's finding that none of the three un-Mirandized admissions (not even the first) was preceded by interrogation and that each was voluntary.

The evidence reasonably supports the appellate court's alternative conclusion that any error was harmless beyond a reasonable doubt, given the overwhelming evidence of Petitioner's guilt beyond a reasonable doubt, even without the three admissions and the search-observations.

ARGUMENT

I. THE TOTALITY OF THE EVIDENCE REASONABLY SUPPORTS THE TRIAL COURT'S FINDING OF VOLUNTARY CONSENT BY PETITIONER TO THE SEARCH AND SEIZURE OF HIS GUNS.

(THE RECORD ALSO REASONABLY ESTABLISHES INEVITABLE DISCOVERY OR INDEPENDENT EVIDENCE OF HIS GUNS.)

A. CONSENSUAL SEARCH

Courts determine whether consent to a search is voluntary by examining the totality of the circumstances. *United States v. Mendenhall*, 446 U.S. 544, 557, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980). The State must prove consent was freely and voluntarily given. *Florida v. Royer*, 460 U.S. 491, 497, 103 S. Ct. 1319, 75 L. Ed. 2d 229 (1983). The proof must be by a preponderance of the evidence. *See Lego v. Twomey*, 404 U.S. 477, 488-89, 92 S. Ct. 619, 30 L. Ed. 2d 618 (1972); *Schneckloth v. Bustamonte*, 412 U.S. 235, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973). It is a question of fact; the reviewing court must affirm unless the trial court's finding is clearly erroneous. *Royer*, *supra*.

A voluntary consent to a search is one that is "the product of an essentially free and unconstrained choice by its maker." *Schneckloth*, *supra*, 412 U.S. at 225. The question is whether the defendant's will was "overborne." *Id.* 412 U.S. at 226. That is: was the defendant's consent coerced? *See id.* 412 U.S. at 227-28.

Determining factors include the defendant's age, education, intelligence, experience, and conduct; the length of time involved; and the conduct and statements of the police. *Oregon v. Bradshaw*, 462 U.S. 1039, 1046, 103 S. Ct. 2830, 77 L. Ed. 2d 405 (1983); *Schneckloth*, 412 U.S. at 226. Knowledge of the right to refuse is a factor, but not a *sine qua non*. *Id.* 412 U.S. at 227, 232-34. Consent is not the same as waiver of rights and does not require waiver. *Id.* 412 U.S. at 235-46.

Here the record reasonably supports the trial court's finding that Petitioner voluntarily offered the search and seizure of his guns. His age, intelligence, occupation, course of study, and testimony all reasonably support a free, unconstrained decision. There were no coercive words or conduct. His state of mind by then was calm.

He had been asked, "Where are the guns?", but had immediately refused to answer; and the officers had said nothing more and had not tried to persuade him to answer. *Cf. Michigan v. Mosley*, 423 U.S. 106, 104-05, 96 S. Ct. 321, 41 L. Ed. 2d 313 (1975) (interrogation case; held, assertion of silence was fully respected when officers did not continue questioning or try to persuade suspect to reconsider; thus later admission was volunteered).

Here, the search and seizure were Petitioner's idea. So was limiting them to "safekeeping" purposes (though he inaccurately implies the contrary at p. 3 of his Petition). The police did not accept that limitation, and his own testimony and conduct reasonably support the finding that he did not insist on or expect performance of that limitation.

Nor did his words, "for safekeeping", imply, as the Petition claims, some substantive admission of guilt. His suppression testimony and the officers' testimonies reason-

ably indicate that he meant merely that he wanted his guns kept safe while he was in jail.

Under *Royer*, *supra*, and *Schneckloth*, *supra*, the consent to search and seizure was thus reasonably found to be voluntary. Thus the testimony about the search and seizure was fully admissible. *See Royer*, *supra*.

B. INEVITABLE DISCOVERY AND INDEPENDENT EVIDENCE

Alternatively, evidence initially discovered in an unconstitutional manner may be received if the record shows by a preponderance that the same evidence inevitably would have been obtained lawfully in the normal course of police investigation. *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984). It likewise may be received if the record shows by a preponderance that the evidence would have been discovered by means wholly independent of any constitutional violation. *Id.* 467 U.S. at 443-44.

The focus of analysis is not what might have been done, but what investigatory measures necessarily or inevitably would have been taken, even absent the police intrusion in question. *See id.* Factors to consider are whether: (1) the searchers were already seeking the specific evidence obtained by that intrusion; and (2) in the "natural and probable course of events," the search would soon have led to the discovery without that intrusion. *Id.*

Here, the officers would inevitably have found Petitioner's guns. Detective Norton started planning to get a search warrant as soon as Petitioner refused to provide the location; only Petitioner's change of mind prevented the detective

from doing so. Petitioner was in custody and could not remove the guns.

Similarly, Victim May had independently already told the officers that Petitioner had them, giving the police probable cause for a search warrant, *see Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983).

Thus even if, *arguendo*, the trial court had erred in finding there was no voluntary consent to the search, the admission of the gun-observation evidence was reasonable and must be affirmed, either as a matter of inevitable discovery, *see Nix*, *supra*, or of independent evidence, *see id.*; *Murray v. United States*, 487 U.S. 533, 537-39, 108 S. Ct. 2529, 101 L. Ed. 2d 472 (1988).[2]

II. THE TOTALITY OF THE EVIDENCE REASONABLY SUPPORTS THE TRIAL COURT'S FINDING THAT PETITIONER'S THREE UN-MIRANDIZED ADMISSIONS WERE VOLUNTARY AND NOT PRECEDED BY INTERROGATION.

A. NO *MIRANDA* WITHOUT INTERROGATION

When a suspect makes a statement while in custody and under interrogation, he must be advised *inter alia* of his right to remain silent. *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

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[2] This is so, even though the Colorado Court of Appeals did not discuss the two doctrines (the State had asserted both). *See Dandridge v. Williams*, 397 U.S. 471, 475, n.6, 90 S. Ct. 1153, 25 L. Ed. 2d 491 (1970).

"Interrogation" is typically found to exist when there are: (1) express questions by a police officer, or (2) words or acts by an officer that he should know are reasonably likely to elicit an incriminating response. *Rhode Island v. Innis*, 446 U.S. 291, 300-01, 100 S. Ct. 1682, 64 L. Ed. 2d 297 (1980). The existence of interrogation turns primarily on the perception of the suspect, not on the intent of the officer. *Id.* 446 U.S. at 301.

B. FIRST ADMISSION: POSSESSION OF THE GUNS

1. Non-Accusatory Request Is Not Interrogation.

A non-accusatory request that a person consent to a search is not interrogation. *United States v. Gay*, 774 F.2d 368, 379 (10th Cir. 1985). *See Innis, supra.*

In Petitioner's case, after informing him of his arrest and charge, an officer asked Petitioner one, single question: "Where are the guns?" This was non-accusatory, and it reasonably implied a request for consent to a search. **The Petitioner patently perceived it that way**, and his perception controls. *See Innis*. Thus, the question was not an interrogation, *Gay, supra*; *see Innis*. There was thus no error in the admission of Petitioner's answer. *See Innis*.

2. Public-Safety Inquiry is Not Interrogation.

Asking a suspect where a gun is located is not interrogation when asked in order to protect police or others from the weapon. *New York v. Quarles*, 467 U.S. 649, 655-56, 104 S. Ct. 2626, 81 L. Ed. 2d 550 (1984). In the instant

case, the one question asked of Petitioner, "Where are the guns?", was precisely a request to know **where** the guns were. It was patently not a request to know whether Petitioner had used guns. It was not even a request to know whether he had possessed guns. (May had already told the police that he had both possessed and used them.)

Rather, the police had seen Petitioner display great volatility and substantial risk of violence when they informed him of his arrest. This fact, plus his false missing-person report, and May's relation of his threats and his aggressive, volatile behavior toward her while armed, all made it reasonable for the officers to view him as capable of irrational, reckless, and dangerous disposition of the firearms.

The police did not know where the guns were. Petitioner had asked the police to locate May, and could have brought the guns with him, thinking the police would tell him where she was. The weapons could have been outside the police station, unattended, perhaps visible; or in the possession of a waiting companion; or in some other publicly-accessible or visible place. They could have been left somewhere loaded, with their safeties off. They could have been left at home in circumstances endangering May if she were to return for more of her possessions.

As *Quarles* holds, *supra*, 467 U.S. at 657:

> In such a situation, if the police are required to recite the familiar *Miranda* warning before asking the whereabouts of the gun, suspects in [the defendant's] position might well be deterred from responding.

The officer needed an answer to his question "to insure that further danger to the public did not result from the

concealment of the gun in a public area." *Id.* The test is whether the evidence shows the officers' questions were "**reasonably** prompted by a concern for public safety." *Id.* (emphasis added). This test is met on this record. And, as in *Quarles*, 467 U.S. at 654, there is "no claim that Petitioner's statements were actually compelled by police conduct which overcame his will to resist."

Thus Petitioner's volunteered response to the police question was reasonably admitted, despite the absence of a *Miranda* warning.[3]

C. THE TWO LATER ADMISSIONS: NO INTERROGATION; VOLUNTARINESS

As for the two statements volunteered by Petitioner to the police in returning to the police station, neither the slightest questioning, nor soliciting words or acts, preceded either of them. Under *Innis*, *supra*, no interrogation was present, hence *Miranda's* advisement of rights was not required, and the two admissions were properly admitted into evidence if they were volunteered.

"Voluntary" means "the product of an essentially free and unconstrained choice by its maker." *Schneckloth*, *supra*, 412 U.S. at 225. The question is whether the defendant's will was "overborne." *Id.* at 226. It is determined on the totality of the circumstances. *Id.*

Thus coercive police activity "is a necessary predicate" to finding that a self-incriminating statement is not voluntary.

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[3] Again, this is so, even though the Colorado Court of Appeals did not address the public-safety exception (the State had asserted it). *See Dandridge*, *supra*.

Colorado v. Connelly, 479 U.S. 157, 167, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986); *Schneckloth*, *supra*, 412 U.S. at 227-28. Absence of coercion must be established by the State by a preponderance of the evidence. *Connelly*, 479 U.S. at 168; *Lego*, *supra*; *see Schneckloth*, *supra*.

Determining factors include the age, education, intelligence, experience, and conduct of the defendant, the length of time involved, and the conduct and statements of the police. *Bradshaw*, *supra*, 462 U.S. 1046; *Schneckloth*, 412 U.S. at 226. Knowledge of the right to refuse consent may be a factor, but it is not a requirement. *Schneckloth*, 412 U.S. at 227, 232-34. Voluntariness is a separate issue from waiver. *Id.* 412 U.S. at 235-46.

Here, as the trial court found, Petitioner's admitted education, intelligence, experience, and frame of mind all reasonably support voluntariness, by a preponderance. And in *Connelly's* language, "the record is devoid of any suggestion that the police resorted to physical or psychological pressure to elicit" the two later admissions. The tone of the participants was "normal." The Petitioner was "real cooperative." The officers had just let him stop to give water to his dog.

Petitioner claims that, if the un-Mirandized question constituted interrogation, it encompassed and coerced the two later statements. But "interrogation" had ceased after the asking of the question, and it had not resumed when Petitioner volunteered his two admissions. Only when interrogation has resumed before the voluntary self-incrimination do the Fifth Amendment advisement and waiver return as requirements. *Bradshaw*, *supra*, 462 U.S. at 1044-45.

Moreover, time had passed, the location had changed from the police station to Petitioner's home, and the action had changed from arrest to search and seizure. Thus, the two later admissions were not responses to the question. *Cf. Nardone v. United States*, 308 U.S. 338, 341, 60 S. Ct. 266, 84 L. Ed. 307 (1939) (unlawful search; attenuation dissipates taint, precluding exclusion of evidence); *accord Murray*, *supra*, 487 U.S. at 537.

III. THE RECORD REASONABLY SUPPORTS THE CONCLUSION THAT THERE WAS OVERWHELMING EVIDENCE OF GUILT BEYOND A REASONABLE DOUBT WITHOUT THE ADMISSIONS AND THE SEARCH-OBSERVATION TESTIMONY.

Even when an admission is coerced, if there is ample other evidence without it to support conviction beyond a reasonable doubt, admitting the coerced admission into evidence is harmless beyond a reasonable doubt. *Arizona v. Fulminante*, 499 U.S. 279, 295, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *see Chapman v. California*, 386 U.S. 18, 24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967). Likewise, admission of the fruit of an illegal search is harmless beyond a reasonable doubt given ample other evidence of guilt beyond a reasonable doubt. *See Fulminante*, *supra*; *Chapman*, *supra*.

Factors to consider include whether the incriminating statement was a full confession, whether conviction depended on the jury believing the illegal evidence, whether that evidence was merely cumulative, and whether its admission led to admission of other prejudicial evidence. *Fulminante*, *supra*, 499 U.S. at 296-301.

Thus, even if, *arguendo*, the three disputed admissions here were all coerced, and the search was illegal, the Colorado Court of Appeals correctly concluded that any error would have been harmless beyond a reasonable doubt. As the Statement of the Facts summarizes above, none of the admissions was a confession; each was an ancillary reference to one of the many facts of the crime. The police observation of the guns was likewise ancillary. The admission of the three statements and the search-observation testimony into evidence did not lead to admission of any other evidence; nor were the four disputed items foundational to other evidence.

And successful prosecution did not depend on whether the jury believed the four items. Each was cumulative to May's testimony about the same facts. (That is: (1) that Petitioner had guns; (2) that he threatened to kill himself; and (3) that he must have known May had left him when he reported her missing.) Despite the lack of corroborating physical evidence of a physical struggle, despite the absence of other eyewitnesses, her evidence was overwhelming on its face in its proof of guilt beyond a reasonable doubt.

The Petition argues to the contrary that May's credibility was adversely affected by the omission from the police report of any mention that Petitioner had fired a gun during their argument. The argument is incorrect. First, May was not the one who initiated this case; she did not contact the police. Thus the omission of the gunshot from the report reflects on the thoroughness of the police, who reported her answers. (May testified that she had told the police everything she told the jury.)

Second, her credibility on the face of the trial transcript is overwhelming. She testified articulately, consistently, in detail, and at length about the events of the crime and the

surrounding circumstances. Her sincerity and intelligence were patent. She was compassionate toward the defendant.

And nothing called her credibility into question specifically as to his possession of the guns, his suicide threats, or his knowledge (through her note, absent clothes, and previous expressions of intent) that she had departed.

CONCLUSION

No fair reading of the record could possibly give rise to a supportable conclusion that the evidence does not reasonably support the trial court's findings and the appellate court's conclusions. Thus the Petition for Writ of Certiorari presents no new legal issue and no cognizable factual issue. It therefore should be denied.

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